MOTION FILED
DEC 19 1994

No. 94 - 909

In the
Supreme Court of the United States
OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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30 pp

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MOTION OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The undersigned professors of international law hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The written consent of counsel for Petitioner Hugo Princz has been obtained. The written consent of counsel for Respondent the Federal Republic of Germany was requested but refused.

These professors collaborated *ad hoc* as an informal group in the presentation of this brief, in order to present their concerns to the Court as it considers whether to grant certiorari in this matter. The professors present their views in their individual capacities as international legal scholars only, and not as representatives of the educational institutions to which they are attached.

As professors of international law, the *amici* have followed the developing jurisprudence of the Foreign Sovereign Immunities Act ("FSIA") with great interest, and increasingly, with great concern as well. In recent years, the courts have struggled to determine the appropriate scope of the FSIA, and in particular the scope of the implied waiver provision. The application of this statute has been inconsistent at best, with various lowers courts alternatively embracing and rejecting both the legislative history and standards of international law as tools of construction.

The brief of *amici* in support of petitioner presents the issues raised in this case in broader historical perspective, and focuses on the future ramifications of the Court of Appeal's decision if this Court declines to grant a writ of certiorari. The *amici* thus place this case in its analytical context in a manner which neither petitioner nor respondent could, and in this sense believe that this brief contains a more complete presentation of the interrelationship between federal law and international law.

The *amici*'s interest in this case transcends mere academic curiosity, as the role of international legal scholars in the progressive development of international law has been widely recognized, even by the International Court of Justice. *See* Statute of the International Court of Justice, Art. 38. After evaluating trends in the interpretation of the FSIA over the course of several years, it has become apparent that the lower courts feel the lack of general guiding principles in applying the waiver provision, § 1605(a)(1). This case provides an opportunity to provide such guidance, as it presents difficult issues concerning the interrelationship between federal law and international law which will recur with the ever-expanding transnational commercial opportunities and the growing socio-economic interdependence between states.

Some of the undersigned professors have been involved

in this litigation since mid-1993, when they joined a brief *amicus curiae* in support of Plaintiff-Appellee Hugo Princz, prepared by the Anti-Defamation League of B'nai B'rith, filed in the United States Court of Appeals for the District of Columbia Circuit (Nos. 92-7247 and 93-7006 (consolidated)). Since that time, this case has attracted the attention of other professors involved in international law. As Respondent had granted its consent to the participation of various faculty members of the American University's Washington College of Law in the appellate proceedings below, the undersigned *amici* do not understand why Respondent would prefer to exclude them from participating before this Court.

Amici believe that, as stated above, their perspective of the issues presented for review in this case is sufficiently different as to be of assistance to this Court in determining whether to grant a writ of certiorari. The Motion for Leave to File the attached brief should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

I. Whether the Foreign Sovereign Immunities Act incorporates the preexisting federal common law of foreign sovereign immunity, including applicable standards of international law?

II. Whether the Foreign Sovereign Immunities Act provides immunity for acts of genocide and other violations of international law for which the international community denies the right of sovereign immunity?

III. Whether the Foreign Sovereign Immunities Act provides jurisdiction over a suit by an American citizen who alleges that he was injured by a foreign state, within its territory, by that government's acts of genocide and other acts in violation of international law, for which the international community denied the right of sovereign immunity.

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BRIEF OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The *amici* are several professors of international law at various universities throughout the nation. They have collaborated in the production of this brief in order to present their concerns to the Court as it considers whether to grant certiorari in this matter. The *amici* express these views in their individual capacities as international legal scholars only, and not as representatives of the educational institutions to which they are attached.

As professors of international law, the *amici* have followed the developing jurisprudence of the Foreign Sovereign Immunities Act ("FSIA") with great interest, and increasingly, with great concern as well. In recent years, the

courts have struggled to determine the appropriate scope of the implied waiver provision. Their conclusions have usually hinged upon a reference to three examples contained in the legislative history of the Act. With few exceptions, the courts have been reluctant to find implied waivers of foreign sovereign immunity on other bases, including those provided by international law.

The legislative history of the Act specifically stated that the intent of Congress was, *inter alia*, to codify the federal law of foreign sovereign immunity. That jurisprudence by necessity included international law, a fact that Congress expressly recognized by incorporating into the new statutory regime standards of international law, especially in §§ 1330(a) and 1604, concerning the general denial of immunity for violations of treaty law.

Although some judicial opinions have discounted the role of international standards with regard to implied waivers under § 1605(a)(1), other opinions have reflected those international standards. The disparity in approaches demonstrates genuine uncertainty as to the scope of the implied waiver provision in the FSIA, and the role of these international standards in statutory construction. The resolution of this disparity in approaches will prevent confusion among the courts called upon to determine these issues.

The majority's holding below that the implied waiver provision of the Foreign Sovereign Immunities Act does not provide jurisdiction over Hugo Princz' claim against the Federal Republic of Germany constitutes the most egregious rejection of standards of international law in the interpretation of the implied waiver provision of the FSIA. Such an unqualified rejection of international law as a canon of statutory construction provided the impetus for the *amici* to join together in order to urge this Court to clarify the jurisprudence by providing guiding principles for the interpretation of the implied waiver provision.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to resolve the intolerable conflict between the Court of Appeals' interpretation of the implied waiver provision of the Foreign Sovereign Immunities Act and the requirements of international law, which have been incorporated as law of the United States and have been recognized by this Court.

Judge Ginsburg, writing for the majority below, essentially concluded that even intentional and express violations of *jus cogens*, the highest peremptory norms of international law, could never be construed as an implied waiver of immunity under the Foreign Sovereign Immunities Act (Pet. App. at 18a-20a). The majority below recognized that this issue, presented by the *amici*[1] in the appellate proceeding, appeared to be one of first impression. The majority noted, however, that the Ninth Circuit had made a general pronouncement that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA" when considering a torture claim suffered by a non-U.S. citizen arising from acts occurring within the foreign state of which the claimant was a national. *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (Pet. App. at 18a). The facts of *Siderman de Blake* do not sufficiently coincide with the facts of this case so as to justify the majority's reliance on that general pronouncement; nor is this a case in which a U.S. citizen was subjected to excessive force by the police of a foreign country. *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471 (1993). This case involves a U.S. citizen who, solely by

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[1]The *amici* in the appellate proceeding were the Anti-Defamation League of B'nai B'rith, the International Association of Jewish Lawyers and Jurists, and faculty members of the American University's Washington College of Law in their individual capacities.

reason of his religion, was subjected to slave labor and subsequently slated for extermination by an enemy of the United States, all in violation of universally accepted principles of international law.

The majority's rationale for not finding an implied waiver was based upon its determination that an implied waiver requires an intentional act. It claimed to distill this conclusion from previous opinions of various circuit Courts of Appeals. *See, e.g.*, *Drexel Burnham Lambert* v. *Committee of Receivers*, 12 F.3d 317, 326 (2d Cir. 1993); *Foremost McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph* v. *Office of Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Frovola* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985); *Zernicek* v. *Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex, 1985), *aff'd* 826 F.2d F.2d 415 (5th Cir. 1987). The majority below seems to have concluded that the examples of implied waivers contained in the legislative history were exhaustive, although such a position is not compelled by the legislative history. H.R. REP. 1487, 94TH CONG., 2D SESS. 18, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617.

The majority then concluded that although the Third Reich's government realized that it had violated *jus cogens* norms for which it would be held responsible, and although the present German government repeatedly indicated its abhorrence for the actions committed by Germany during the Holocaust and made attempts to compensate its victims, there was no indication "that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of Nazi atrocities" (Pet. App. at 19a). Yet these actions, though not reflective of an express waiver, do indicate recognition by Germany of its violations of international law and that these intentional acts are not protected by sovereign immunity, and thus constitutes an

implied waiver of any of the protections granted by the FSIA.

International law has long since resolved the paradox of sovereignty and sovereign violations of such law, especially *jus cogens*. Unfortunately the majority was unable to resolve that paradox, and concluded that international law must yield to supposed dictates of Congressional legislation, even where legislation should be construed in a manner consistent with international law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

When a sovereign's act violates *jus cogens*, it loses its legitimacy and sovereign or protectable character under international law. *See Berg* v. *British and African Steam Navigation Co.*, 243 U.S. 124, 153-156 (1917) [hereinafter "*The Appam*"]; *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 350-55 (1822); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1821) (No. 15,551); *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); 9 Op. Att'y Gen. 356, 362-63 (1859); EMERIC DE VATTEL, THE LAW OF NATIONS Bk. 1, Ch. 4, § 54 (Leiden, 1758). Universally denounced violations of *jus cogens*, such as genocide, give rise not only to prescriptive jurisdiction, but also to enforcement or adjudicative jurisdiction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423, 702 & comments d, n. *See also* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 371-74 (1991) (and cases cited therein). This basis of jurisdiction has been widely accepted by the international community, particularly in its establishment of the Nuremberg War Crimes Tribunal. Thus, international law permits both prescriptive and enforcement or adjudicative jurisdiction for violations of *jus cogens*. Congress, however, in the FSIA, indicated the need for either an express or implied waiver of sovereign immunity

to assert jurisdiction under § 1605(a)(1). The question thus arises whether Congress intended § 1605(a)(1) to require an intentionality in an express or implied waiver of immunity when there is a violation of *jus cogens* by a foreign sovereign, or whether deliberate acts with knowledge of their violation of international law in themselves constitute an implied waiver.

Courts of the United States have long recognized that the standards of international law are incorporated as law of the United States. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 227, 237, 272, 276, 279 (1796); *Talbot* v. *Janson*, 3 U.S. (3 Dall.) 133, 156, 159-61 (1795); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *Henfield's Case*, 11 F. Cas. 1099, 1101-02, 1107 (C.C. Pa. 1793) (No. 6,360); *see also* 1 Op. Att'y Gen. 68, 69 (1797) ("the common law has adopted the law of nations in its fullest extent and made it a part of the law of the land"); 1 Op. Att'y Gen. 26, 27 (1792) ("the law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land"). In codifying and incorporating the federal customary law of foreign sovereign immunity, Congress stated that the judiciary is to evaluate "claims [of sovereign immunity] by foreign states on the basis of a statutory regime which *incorporates standards recognized under international law*." H.R. REP. No. 1487, 94TH CONG., 2D SESS. 12, 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613; *see also* 28 U.S.C. §§ 1330(a) 1602, 1604, 1609. Therefore standards of international law should be employed by the judiciary as it interprets the waiver provision of the Foreign Sovereign Immunities Act.

At the outset of this century, this Court affirmed that

> International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly

presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1900) (citing *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). Furthermore, this Court has indicated that

> An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate . . . rights . . . further than is warranted by the law of nations . . . .

The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). *See also Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *Ross* v. *Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); *The Resolution*, 2 U.S. (2 Dall. 1, 4 (1781); 11 Op. Att'y Gen. 197, 199-300 (1865); 9 Op. Att'y Gen. 356, 362-63 (1859); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892). The majority's interpretation of the FSIA, inconsistent with international law, would grant immunity to sovereigns that violate fundamental norms of international law, i.e., *jus cogens*, acts which every country has condemned. Such an intent on the part of Congress cannot be proven, is certainly not clear and manifest and therefore cannot be a proper construction of the FSIA.

The District Court held that the acts of Nazi Germany were those of an outlaw state, and that as such Germany was estopped to assert the privilege of sovereign immunity under the FSIA (Pet. App. at 57a, 59a - 60a). On appeal from that decision, Judge Wald, in dissent, recognized the absence of immunity and also found that such immunity was inconsistent with the teachings of this Court. Judge Wald indicated that although the sole basis of obtaining jurisdiction over a foreign state is under the FSIA, *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428, 434 (1989), to disallow an action would be

inconsistent with the standards of international law which Congress intended to incorporate into the FSIA. Judge Wald also found that the facts here involved indicated the existence of an implied waiver of Germany's sovereign immunity.

The majority opinion presents an intolerable conflict with this Court's opinions in *The Appam*, *Hilton* v. *Guyot*, *The Santissima Trinidad*, *The Nereide*, *Talbot* v. *Janson*, *Talbot* v. *Seeman* and *The Charming Betsy*. By selective reading of the legislative history, the majority below rejects the fundamental purpose of Congress in establishing the FSIA — to codify the existing federal law of foreign sovereign immunity in a manner which incorporates international standards and serves the interests of justice. *See* § 1602. The restrictive construction of the FSIA by the majority below is inconsistent with the principles of international law. As Professor Paust has noted,

> "sovereignty is conditioned on obedience to international law, the law upon which sovereignty rests . . . Similarly, judicial deference . . . is rightly conditioned upon foreign state respect for international law . . . [and] an illegal act is incapable of protection by the judiciary. To hold otherwise would be to further illegality, give it legal effect, and fulfill its illegal nature at the hands of a court of law. This a court cannot do.

Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violators of International Law under the FSIA*, 8 HOUS. J. INT'L L. 49, 59 (1985); *see also id.* at 57-65, *passim*. The majority, by refusing to find an implied waiver of immunity has in effect impermissibly "thwart[ed] a universal sanctions effort directed at international criminal activity." Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State*

Doctrine, 23 VA. INT'L L. REV. 191, 226 (1983); *see also id.* at 221-27.

This Court need not further such illegality. Especially after *The Santissima Trinidad* and *The Appam* (citing *The Santissima Trinidad*, 243 U.S. at 154-55), Germany must have known and expected that its intentional acts in serious and criminal violation of international law were outside the sphere of protectable sovereign acts, that it could be held responsible, and that it could be judged by law and in fora other than its own, even including, per *The Appam* and *The Santissima Trinidad*, courts of the United States. Such knowledge and expectation pertains especially when there is an implied waiver of immunity, for it is the state's intentional and illegal conduct coupled with such knowledge and expectation that results in the implicit waiver of protection. What state could rightly expect to be immune with respect to serious, criminal violations of international law?

Further, Congress did not require that a waiver be express; and thus, tests cannot exclude implicit waivers. For example, Congress recognized that consent to arbitration or to submit to laws of some other state constitutes an implicit waiver. As its attempts to destroy evidence of its violations of international law demonstrate, Germany clearly understood that it could be judged according to principles of recognized international law, the law that forms the very basis for any claimed immunity. The existence of such law has been recognized by the Constitutional Court of Germany in its decision of April 7, 1965, Bundesverfassungsgericht, BVerfGE, W. Ger. *quoted in* Stefan Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 513 (S. Riesenfeld trans. 1966).

Although this matter would appear to be a case of first impression, the underlying issue presented is well "beyond the

academic or the episodic", *Rice* v. *Sioux River Cemetery*, 349 U.S. 70, 74 (1955), and therefore is worthy of this Court's consideration. As travel within the international community is facilitated by improved technology and the demise of politically based travel restrictions, and is encouraged by expanding business opportunities, the decision of the majority below would leave citizens of the United States at risk of becoming victims of state-sponsored terrorism and other violations of the fundamental norms of international law, just as the Princz family was. Less than fifty years after Nuremberg, the international community once again has found the need for a war crimes tribunal.

In other instances where Congress has expressly incorporated international standards into legislation, this Court has recognized the prudence of identifying the relevant legal precepts and clarifying the appropriate method of their application. *See, e.g., Ex parte Quirin*, 317 U.S. at 7-28; *Hilton* v. *Guyot*, 189 U.S. at 163; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-62 (1820); *The Nereide*, 13 U.S. (9 Cranch) at 421. The majority opinion seems to be contrary to the argument of the Office of the Solicitor General, in *Filartiga* v. *Pena-Irala*, that "it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law." Brief of the United States as *Amicus Curiae*, *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 583, 604 (1980) (*Cf.* Pet. App. at 20a n.1) .

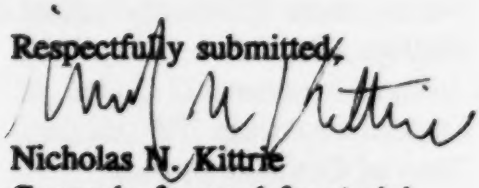
This Court has provided guidance to the lower courts by reviewing some other issues raised under the Foreign Sovereign Immunities Act. Accepting the FSIA as the sole basis of jurisdiction over foreign states, a uniform interpretation the Act consistent with legislative intent and international law is of foremost importance. Such guidance in relation to the jurisprudence of the implied waiver provision and of the extent of the FSIA is urgently needed. Lower

courts are struggling with the application of the implied waiver provision to variants of the *Princz* situation, and with the question how far United States law would prevent a U.S. citizen obtaining compensation for the activities of a foreign government which has violated *jus cogens*. This case gives the Court the opportunity to clarify the parameters of the FSIA.

CONCLUSION

If the majority opinion is permitted to stand and Germany retains immunity from this suit, then the teachings of this Court regarding the applicability of international law will be contradicted. The result would be that the law of the United States recognizes an immunity which the international community has already determined cannot be retained. In effect, the majority opinion not only generally ratifies the Nazi campaign of genocide and barbarism as a legitimate sovereign activity — but even ratifies such acts when committed against a U.S. citizen. This Court should exercise its power of judicial supervision to resolve the intolerable conflict this opinion presents in the light of this Court's teachings and the expressed intent of Congress.

Respectfully submitted,



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